

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMIE J. HORNBAKER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

Case No. 3:14-cv-05155-KLS

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his applications for disability insurance and supplemental security income ("SSI") benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below, defendant's decision to deny benefits should be reversed and that this matter should be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On September 22, 2010, plaintiff filed concurrent applications for disability insurance benefits and SSI, alleging disability as of April 1, 2008, due to depression, anxiety, and left wrist pain. See Administrative Record ("AR") 183-98, 243. Plaintiff's applications were denied upon initial administrative review and on reconsideration. See AR 118-21, 125-29. A hearing was

1 held before an administrative law judge (“ALJ”) on September 18, 2012, at which plaintiff,
2 represented by counsel, appeared and testified, as did a vocational expert (“VE”). See AR 34-65.

3 On October 9, 2012, the ALJ issued a decision in which plaintiff was determined to be
4 not disabled. See AR 8-35. Plaintiff’s request for review of the ALJ’s decision was denied by
5 the Appeals Council on January 16, 2014, making the ALJ’s decision defendant’s final decision.
6 See AR 1-6; see also 20 C.F.R. §§ 404.981, 416.1481. On February 24, 2014, plaintiff filed a
7 complaint in this Court seeking judicial review of the ALJ’s decision. See Dkt. No 1. The
8 administrative record was filed with the Court on May 6, 2014. See Dkt. No. 12. The parties
9 have completed their briefing, and thus this matter is now ripe for judicial review and a decision
10 by the Court.
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12 Plaintiff argues the ALJ’s decision should be reversed and remanded to defendant for
13 payment of benefits, because the ALJ erred: (1) in evaluating the medical evidence in the record;
14 and (2) in finding him to be capable of performing other jobs existing in significant numbers in
15 the national economy. The Court agrees the ALJ erred in determining plaintiff to be not
16 disabled, but, for the reasons set forth below, finds that while defendant’s decision should be
17 reversed, this matter should be remanded for further administrative proceedings.
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20 DISCUSSION

21 The determination of the Commissioner of Social Security (the “Commissioner”) that a
22 claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been
23 applied by the Commissioner, and the “substantial evidence in the record as a whole supports”
24 that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v.
25 Comm’r of the Soc. Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772
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1 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will,
 2 nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence
 3 and making the decision.”) (citing Browner v. Sec’y of Health and Human Serv., 839 F.2d 432,
 4 433 (9th Cir. 1987)).

5 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
 6 adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation
 7 omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
 8 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
 9 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
 10 by more than a scintilla of evidence, although less than a preponderance of the evidence is
 11 required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
 12 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
 13 Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
 14 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
 15 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).¹

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19 I. The ALJ’s Evaluation of the Medical Evidence in the Record

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23 ¹ As the Ninth Circuit has further explained:

24 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
 25 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
 26 substantial evidence, the courts are required to accept them. It is the function of the
 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
 not try the case de novo, neither may it abdicate its traditional function of review. It must
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

1 Plaintiff argues the ALJ failed to provide legally sufficient reasons for rejecting the
2 medical opinions of examining psychologist Tasmyn Bowes, PsyD. Dkt. No. 14, pp. 3-6; AR
3 354-77, 403-07, 490-504. Dr. Bowes diagnosed plaintiff with depressive disorder and panic
4 disorder with agoraphobia, and opined plaintiff would have “moderate” to “marked/severe”
5 limitations in the ability to perform activities within a schedule and maintain regular punctual
6 attendance, and in the ability to complete a normal workday and work week without
7 interruptions from psychologically based symptoms. AR 497.

9 The ALJ is responsible for determining credibility and resolving ambiguities and
10 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). In
11 resolving questions of credibility and conflicts in the evidence, an ALJ’s findings “must be
12 supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ must provide “clear
13 and convincing” reasons for rejecting the uncontradicted opinion of either a treating or
14 examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating
15 or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific
16 and legitimate reasons that are supported by substantial evidence in the record.” Id. at 830-31.

18 Plaintiff argues the clear and convincing standard applies to the ALJ’s analysis of the
19 medical opinions of Dr. Bowes. See Dkt. No. 14, p. 6 (noting that check box forms completed
20 by state agency reviewing physicians do not constitute substantial evidence sufficient to
21 contradict the opinion of an examining specialist). See Lester, 81 F.3d at 830. Defendant
22 appears to concede that the clear and convincing standard applies, yet argues the ALJ provided
23 such reasons to reject the opinions of Dr. Bowes. Dkt. No. 15, pp. 3-4. Regardless, this Court
24 finds that the reason offered by the ALJ for rejecting Dr. Bowes’ opinion was not a specific and
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1 legitimate or clear and convincing reason supported by substantial evidence in the record. See
2 Hoffman, 785 F.2d at 1425.

3 It is important to note that in summarizing Dr. Bowes' findings, the ALJ did not
4 specifically discuss Dr. Bowes' function-by-function assessment of what plaintiff is capable of
5 doing despite his mental impairments. See AR 20, 25 (noting only that plaintiff would have
6 "moderately impaired ability to understand, remember, and complete basic tasks"). The ALJ
7 decision does not acknowledge Dr. Bowes' opinions that plaintiff would have moderate to
8 marked/severe limitations in performing activities within a schedule, maintaining regular
9 punctual attendance, and completing a normal workday and work week without interruptions
10 from psychologically based symptoms. This is important because the Commissioner "may not
11 reject 'significant probative evidence' without explanation." Flores v. Shalala, 49 F.3d 562, 570-
12 71 (9th Cir. 1995) (quoting Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir. 1984) (quoting
13 Cotter v. Harris, 642 F.2d 700, 706-07 (3d Cir. 1981))). The "ALJ's written decision must state
14 reasons for disregarding [such] evidence." Flores, 49 F.3d at 571.
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17 Here, the ALJ decision focuses instead on Dr. Bowes' less specific narrative description
18 of the effects of plaintiff's current symptoms on his ability to work, and on Dr. Bowes' statement
19 that plaintiff at times has difficulty accomplishing basic activities of daily living. Compare AR
20 25 ("Dr. Bowes wrote that the claimant's anxiety impacted his ability to focus on tasks to
21 completion, as well as his ability to work with coworkers towards a common goal, persist in
22 tasks, tolerate stress, and to be flexible and deal effectively with unexpected changes in
23 expectations and routine.") with AR 497.
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25 Defendant argues the ALJ properly rejected Dr. Bowes' opinions because they were
26 made unreliable by plaintiff's inconsistent statements. See Dkt. No. 15, pp. 6-7 (citing AR 20,

25). In rejecting Dr. Bowes' opinion, the ALJ wrote: "Dr. Bowes' opinion that [plaintiff] has trouble in accomplishing his activities of daily living is inconsistent with [plaintiff's] testimony at the hearing and the reports to treatment providers." AR 25. This finding, however, is not supported by substantial evidence in the record. See Hoffman, 785 F.2d at 1425.

During the psychological evaluation, plaintiff reported to Dr. Bowes that he usually gets up in the late morning, watches television, and mows the lawn or does other things to try to keep himself occupied. AR 497. Plaintiff reported that there were also days he does not do anything. AR 497. Plaintiff acknowledged being able to cook and clean. AR 497. Plaintiff also reported having a hard time grocery shopping: "when [I] go into a store my anxiety is pretty high." AR 497. With regard to family, plaintiff reported "I see my family once a week or so- they know what is going on with me so they understand too- but I have never been a social person." AR 497. These reports are consistent with plaintiff's hearing testimony, and plaintiff's reports to treatment providers.

At the hearing, plaintiff testified he watched television, washed dishes, did laundry, and vacuumed the floors of his home with some difficulty. AR 49-50 (testifying he got sidetracked two to three times a week while doing household chores). Plaintiff further testified he had difficulty being around others, especially "a lot of people", including in grocery stores, and that he had difficulty leaving the house alone. AR 50.

The ALJ did not identify which treatment records conflicted with Dr. Bowes' statement that plaintiff had difficulty completing activities of daily living; however, the ALJ does discuss plaintiff's reports to his treatment providers elsewhere in the decision. For example, at one point plaintiff reported to his treatment providers that he was able to go to the grocery store with greater ease and "didn't run out" of the store due to anxiety as he had done on previous

1 occasions. AR 19 (citing AR 482). Plaintiff reported he panhandled for rent money. AR 19
2 (citing AR 482). Plaintiff also reported keeping busy with family. AR 19 (citing AR 478 “son
3 visiting from Texas, grandson graduating, daughter getting married... ‘family keeps me busy’.
4 Fewer panic attacks around family, even in public”). Following 15 sessions of therapy, plaintiff
5 reported to his treatment providers he was able to leave the house “more days than not”,
6 including going to the store at nonpeak hours, and was able to prepare himself for this ahead of
7 time. AR 20 (citing AR 474).

9 Contrary to the ALJ’s finding, plaintiff’s testimony and statements to his treatment
10 providers regarding his daily activities are not inconsistent with Dr. Bowes’ opinion that
11 plaintiff, at times, has difficulty performing basic activities of daily living. See AR 497. Nor are
12 they inconsistent with Dr. Bowes’ opinion that plaintiff would have more than moderate
13 limitations in performing activities within a schedule, maintaining regular punctual attendance,
14 and completing a normal workday and workweek without interruptions from psychologically
15 based symptoms. See AR 497.

17 Defendant further argues that Dr. Bowes’ report contains statements from plaintiff that
18 are inconsistent with the record as a whole, including statements regarding plaintiff’s past
19 substance abuse. Dkt. No. 15, p. 7 (comparing AR 497 (in response to questioning regarding his
20 drug of choice plaintiff responded “I did alcohol when I was younger but not in 20
21 years”)(emphasis added), with AR 309 (“Historically [plaintiff] has had CD treatment about ten
22 years ago and states until recently he has been clean and sober for 15 years” and noting
23 toxicology report was positive for methamphetamines). Even if these statements regarding
24 plaintiff’s past substance use are inconsistent, this additional rationale was not cited by the ALJ
25 to reject Dr. Bowes’ opinion. See AR 25. According to the Ninth Circuit, “[l]ong-standing
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principles of administrative law require us to review the ALJ's decision based on the reasoning and actual findings offered by the ALJ - - not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." Bray v. Comm'r of the Soc. Sec. Admin., 554 F.3d 1219, 1225-26 (9th Cir. 2009) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (other citation omitted)); see also Molina v. Astrue, 674 F.3d 1104, 1121 (9th Cir. 2012) ("we may not uphold an agency's decision on a ground not actually relied on by the agency") (citing Chenery Corp., 332 U.S. at 196). For these reasons, the ALJ's assessment of Dr. Bowes' medical opinions is not supported by substantial evidence and is reversed. See Hoffman, 785 F.2d at 1425.

II. The ALJ's Findings at Step Five

Plaintiff also takes issue with the ALJ's findings at step-five of the sequential evaluation process. Dkt. No. 14, pp. 9-12. However, as defendant points out, because the ALJ also determined plaintiff was capable of returning to his past relevant work as a construction worker at step-four of the sequential evaluation process, any errors made by the ALJ in conjunction with the alternate step-five findings are harmless. See Molina, 674 F.3d at 1115 (an ALJ's error is harmless where it is "inconsequential to the ultimate nondisability determination")(quoting Carmickle v. Comm'r Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th Cir. 2008)). This Court has already determined, however, that the ALJ erred in his assessment of the medical evidence. On remand, the Commissioner shall reassess the medical opinion evidence of Dr. Bowes, and, if warranted reassess plaintiff's claims at the subsequent steps of the sequential evaluation process.

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1 III. This Matter Should Be Remanded for Further Administrative Proceedings

2 The Court may remand this case “either for additional evidence and findings or to award
3 benefits.” Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court
4 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the
5 agency for additional investigation or explanation.” Benecke v. Barnhart, 379 F.3d 587, 595 (9th
6 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record
7 that the claimant is unable to perform gainful employment in the national economy,” that
8 “remand for an immediate award of benefits is appropriate.” Id.

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10 Benefits may be awarded where “the record has been fully developed” and “further
11 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan
12 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
13 where:

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15 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
16 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
17 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

18 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

19 Here, further development of the record is needed to reassess the medical opinion of examining
20 psychologist Dr. Bowes, and, if necessary, obtain additional vocational expert testimony
21 regarding the significance of the limitations opined by Dr. Bowes. If warranted, the
22 Commissioner also shall reassess plaintiff’s claims at the subsequent steps of the sequential
23 disability evaluation process.
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CONCLUSION

Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded plaintiff was not disabled. Accordingly, defendant's decision is REVERSED and this matter is REMANDED for further administrative proceedings in accordance with the findings contained herein and pursuant to sentence four of 42 U.S.C. § 405(g).

DATED this 10th day of September, 2014.



Karen L. Strombom
United States Magistrate Judge